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No. 1145

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

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WILLIAM ROGER PASCENTE and FRANK J. FURIO,
*Petitioners,*

VS.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, William Roger Pascente and Frank J. Furio, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

## JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 20, 1966, and is not reported, but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of the record.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed December 26, 1967 and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record.

## STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on December 26, 1967. On January 24, 1968, it was ordered that the petition for rehearing be denied, and on the same date, January 24, 1968, it was ordered that the petition for rehearing *en banc* be denied with two Judges voting to grant the rehearing *en banc*. (These orders appear in the appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Is the mere use of the words "cartons of merchandise", without any further description in a search warrant, sufficiently specific to satisfy the requirement of the Fourth Amendment that "no Warrants shall issue, but upon probable cause * * *, and particularly describing *the* * * * *things to be seized*"?

2. Does not this decision of the Seventh Circuit Court of Appeals approving the use of the word "merchandise" to describe the things to be seized under a Search Warrant, constitute an approval of "General Warrants" contrary to the Constitution of the United States, and more particularly flatly contrary to this Court's decision in *Stanford* v. *State of Texas*, 379 U.S. 476?

3. Are the following grounds for the issuance of the Search Warrant sufficient to satisfy the requirements of the Fourth Amendment as "probable cause"?

The affidavit for the search warrant reads as follows:

> "The undersigned, being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the Northern District of Illinois, there is now being concealed certain property, namely several cartons of merchandise which constituted interstate commerce and were stolen therefrom. And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:
>
> > This information was furnished affiant by Special Agent Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr. of Mason-Dixon Lines, Chicago, carrier of freight that (sic) he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., February 11, 1965, two men unloading truck of said (sic) into said residence. Maryann Costello living downstairs her (sic) steps up and down stairs at 11:30 P.M. Said terminal (sic) stated he found five interstate shipments missing from one of their trucks after the time stated."

4. Does the Fourth Amendment's protection require that inferences from evidence submitted in support of a search warrant be drawn by a neutral and detached magistrate? (*Johnson* v. *United States,* 333 U.S. 10.) (*In Re Murchison,* 349 U.S. 133, 137.)

5. Where a magistrate himself composes the affidavit, which is the sole ground for the issuance of a search warrant, and then passes on its sufficiency, do the Fourth Amendment and Rule 41(c) of the Federal Rules of Criminal Procedure require that the person, whose home is searched and whose conviction ensues based upon the search, make any further showing of prejudice? (*Schmerber* v. *California,* 384 U.S. 757, 770.)

## STATEMENT OF THE CASE.

This cause was instituted on May 22, 1965 by the filing of a two-count indictment charging, in the first count, possession of goods stolen from an interstate shipment of freight by defendants William Roger Pascente and Frank J. Furio, in violation of Section 659, Title 18, United State Code. The second count charged the defendant William Roger Pascente with the theft of the same goods in violation of the same section. The case was tried before the trial judge sitting without a jury, jury trial having been waived. All of the facts in the case were stipulated.

The error urged below arose out of a denial of the defendants' Motion to Quash the Search Warrant and to Suppress the Evidence. The defendants were convicted in the Court below and William Roger Pascente was placed on probation for a period of five years and the defendant Frank J. Furio was sentenced to the custody of the Attorney General of the United States for a period of eighteen months. Both defendants are at liberty pending appeal. The defendant, Frank J. Furio, is enlarged on bond in the amount of $10,000.00.

Upon review the errors relied upon relate to the denial of the Motion to Suppress, the sufficiency of the warrant, and the matter of execution. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois and denied the defendants' Petition for Rehearing. Due to an apparent conflict with another decision of the Seventh Circuit in *United States of America* v. *Milton James Roth,* which was handed down November 20, 1967, the petitioners here further sought a rehearing *en banc.* The rehearing *en banc* was denied on January 24, 1968 with Circuit Judges Kiley and Swygert voting to grant the petition for rehearing *en banc.* (The opinion in *United States* v. *Roth,* No. 16173, is printed in the Appendix hereto.)

## STATEMENT OF FACTS

On February 12, 1965, Agents of the Federal Bureau of Investigation applied to the United States Commissioner, C. S. Bentley Pike, for a search warrant describing certain premises as "the second floor of a two-family residence at 1913 West Ohio Street, Chicago, Illinois." The warrant issued, the premises were searched, and the warrant executed on Friday, February 12, 1965, at 4:51 P.M. Agents there seized cartons of clothing, a full description of which is set forth in the inventory which is shown in the Appendix hereto. The premises were occupied by the petitioner, Frank J. Furio. The value of the goods was stipulated as being $735.00. The goods were taken on the evening of February 1, 1965, from the loading dock of the Mason-Dixon Lines, 3357 So. Justine St., Chicago, Ill. It was stipulated that the defendant William Roger Pascente worked as a city driver for Mason-Dixon.

Briefly stated, it would appear, from a reading of a stipulation which is filed in this Court but not made a part of the appellants' appendix, that someone managed to take and carry away from the loading dock certain cartons of clothing. Someone then took a "straight job" (a type of pick-up truck) and apparently drove the truck to the vicinity of 1913 West Ohio Street where the merchandise was deposited in the apartment of the defendant Frank Furio. Upon execution of the search warrant and during the course of their occupation of the premises, the defendant Furio entered the premises and was placed under arrest. The defendant William Roger Pascente was apprehended on the same day, February 12, 1965, by Agents of the Federal Bureau of Investigation. Neither defendant made any admissions concerning the merchandise and disclaimed any knowledge of the merchandise found on the premises of 1913 Ohio Street, Chicago, Illinois.

The facts are not in dispute. No contention is made that the evidence is insufficient. The entire question before this Court is whether or not the search warrant is a valid search warrant and that the affidavit executed in order to secure it sufficiently states probable cause for the issuance of said warrant, and the warrant properly issued.

## SEARCH WARRANT

After the return of the indictment herein, the defendants filed, on June 18, 1965, a timely Petition to Quash the Search Warrant and to Suppress the Evidence, alleging in the petition that the search and seizure of the premises was illegal, unlawful, void and in violation of the Fifth Amendment to the Constitution of the United States, and the statutes and laws of the United States for the following reasons:

1. That said affidavit for search warrant is insufficient in law to establish probable cause for the issuance of a search warrant.

2. The affidavit states no facts sufficient to establish probable cause, justifying the issuance of a search warrant.

3. The search warrant herein was issued on the basis of an insufficient affidavit for search warrant and solely upon the belief of the affiant who made said affidavit, and upon certain unsupported hearsay.

4. That articles were seized from one of the petitioners which were not mentioned in the search warrant as the articles to be seized.

5. That the seizure, therefore, of said articles under color of the warrant was unlawful, void and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The defendants here state that the United States used the evidence so unlawfully seized against the defendants on the trial of this cause. At the trial defendants objected to the evidence on the same grounds. As a result of the admission of said evidence the defendants stand convicted.

The affidavit for the search warrant reads as follows:

> "The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the Northern District of Illinois, there is now being concealed certain property, namely several cartons of merchandise which constituted interstate commerce and were stolen therefrom. And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

> This information was furnished affiant by Special Agent Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr. of Mason-Dixon lines, Chicago, carrier of freight that (sic) he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., February 11, 1965, two men unloading truck of said (sic) into said residence. Maryann Costello living downstairs her (sic) steps up and down stairs at 11:30 P.M. Said terminal (sic) stated he found five interstate shipments missing from one of their trucks after the time stated."

Also considered by the United States Court of Appeals in a concurring opinion by Circuit Judges Cummings and Fairchild was the following matter:

> "The affidavit upon which the search warrant issued was concededly prepared by the United States commissioner although signed by an FBI agent. Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:
>
> > 'A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.'
>
> "This Rule of course contemplates that the supporting affidavit be prepared by the affiant and not by the commissioner. The commissioner is not meant to play the dual roles of magistrate and investigator. Cf. *In re Murchison,* 349 U.S. 133, 137. No prejudice to defendant has been shown, so that reversal is unwarranted. Nevertheless, the practice of having the commissioner prepare any such affidavits should be disapproved in order that it will not recur in any Districts of this Circuit."

## REASONS FOR GRANTING THE WRIT

The Court should issue its Writ of Certiorari to the Seventh Circuit in the instant case for the following reasons:

1. The acceptance by the Seventh Circuit of the word "merchandise" (by definition the objects of commerce; wares; goods; commodities) as satisfying the Fourth Amendment requirement of description of things to be seized is in basic conflict with Constitutional guarantees, and constitutes a "General Warrant" in direct conflict with this Court's decision in *Stanford* v. *State of Texas,* 379 U.S. 476.

2. The acceptance of the affidavit for the search warrant in this case which requires not only interpretation, but translation, has so degraded the requirement of "probable cause" directed by the Fourth Amendment as to constitute basic conflict with Constitutional guarantees and departs entirely from the accepted concept that any construing must be liberal in favor of the individual whose privacy has been "invaded as directed in *Sgro* v. *United States,* 287 U.S. 206 and this Court's decisions relied on therein. 287 U.S. at 210.

3. The effect of the decision of the Seventh Circuit sanctioning the appraisal of a magistrate as to the sufficiency of an affidavit for a search warrant, of which he, the Magistrate, was himself the author, is to deprive the defendant of the neutral and detached consideration to which he is entitled under the Fourth Amendment and said decision is in conflict with this Court's decision in *Schmerber* v. *California,* 384 U.S. 757 and in *Johnson* v. *United States,* 333 U.S. 10.

4. The decision of the Seventh Circuit that such a deprivation of a constitutional entitlement to appraisal by a neutral and detached magistrate, though not endorsed by the Seventh Circuit, is deemed by it to be no consequence in the absence of a positive showing of individual prejudice and this presents a question that has not been, but should be, settled by this Court.

5. Two out of eight judges of the United States Court of Appeals for the Seventh Circuit favored the granting of a Petition for Rehearing *en banc* in this case, the ground for such Petition being an intermural conflict between this decision and *United States* v. *Roth,* 7 Cir., No. 16173 decided November 20, 1967 prior to the decision in this case. In the circumstances, this Court should exercise its power of supervision over lower Courts of Appeal that the public may be rightly informed of what constitutes its rights and immunities from police interference with privacy.

## I.

In this case, there is absolutely no description whatever other than the word "merchandise". That word is so broad that it would include almost any conceivable type of "product" from any manufacturer. The requirement for specificity in a search warrant would be nullified by this decision. If it is sufficient for any agent to merely state that he believes "merchandise" is on the premises of someone's house then we are back to General Warrants or Writs of Assistance. Anything in a man's home except the house itself or the land upon which it rests can be said to be merchandise.

The decision in this case is not only contrary to the decision in the United States Court of Appeals for the same Circuit in *United States* v. *Milton James Roth,* No. 16173

dated November 20, 1967 (about which more will be said later) but is in conflict with this Court's decision in *Stanford* v. *State of Texas,* 379 U.S. 476, 481-486:

> "The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*' (Emphasis supplied.)
>
> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant."
>
> * * *
>
> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *A Quantity of Copies of Books* v. *Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.
>
> "The requirements that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' *Marron* v. *United States,* 275 U.S. 192, at 196, 48 S.Ct. 74, at 76. We

> need not decide in the present case whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or 'cases of whiskey.' See *Steele* v. *United States,* No. 1, 267 U.S. 498, 504, 45 S.Ct. 414, 416, 69 L.Ed. 757. The point is that it was not contraband of that kind which was ordered to be seized, but literary material—'books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas.' The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history."
>
> *Stanford* v. *State of Texas,* 379 U.S. 476, 481-486.

The requirement of the Fourth Amendment that the warrant *shall particularly describe* the place to be searched, and the persons or *things to be seized,* has not been met in this case.

Wherefore, it is respectfully submitted that this Court issue its Petition for a Writ of Certiorari in this cause.

## II.

The Court of Appeals for the Seventh Circuit recognized the affidavit was at least careless. In characterizing the affidavit it said:

> "The affidavit in question consists of a printed form filled in and completed in what is obviously a hasty, handwritten scrawl, replete with abbreviations (some of them rather unconventional) and composed in a highly cryptic style, as follows:"

* * *

> "This information was furnished affiant by Spec Ag Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr of Mason-Dixon Lines, Chicago, carrier of freight that he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., Feb. 11, 1965, 2 men unloading truck of said into said residence. Marianne Costello living downstairs her steps up and down stairs at 11:30 P.M. Said terminal stated he found 5 interstate shipments missing from one of their trucks after the time stated."

Contrary to the principals enunciated by this Court in *Sgro* v. *United States*, 287 U.S. 206, and the many authorities upon which the decision of this Court relies, the United States Court of Appeals for the Seventh Circuit ignored the basic principal that interpretations must be liberal in favor of the individual. In its efforts to sustain as valid the search, it reinterpreted what it thought the affidavit meant to say:

> "Careful study of this document, however, discloses certain facts. Sometime prior to execution of the warrant on Friday, February 12, 1965, shortly before 5:00 p.m., the Terminal Manager, Paul Picquet, of the Mason-Dixon Line, furnished information to Special Agent Anthony Genakos of the F.B.I., who in turn passed it on to the affiant, that he had found five "interstate shipments" missing from one of his trucks. The Terminal Manager had also reported receipt of an anonymous telephone call from an alleged neighbor of 1913 W. Ohio Street, Chicago, the address of the premises later searched, concerning his observation at 11:30 p.m., (an unusual time for delivery of commercial merchandise to a residence) on February 11, 1965, of the activities of two men who were unloading a Mason-Dixon truck and carrying the contents into the house at that address. Special Agent Genakos had also told the affiant that one Marianne Costello, who

> lived on the first floor of the two-apartment building searched, reported hearing footsteps going up and down the stairs at 11:30 p.m. that night."

The petitioners here submit that the Court of Appeals' holding that the search warrant was based on "hearsay but was hearsay from three different sources, two of which were identified, all of which were mutually corroborative in part," ignores the petitioners' basic contention.

The only source which places the "merchandise" (whatever that is) within the premises is an "anonymous call". Hearing footsteps at 11:30 P.M. and finding 5 interstate shipments missing do not relate to the presence of the "merchandise" within the premises. The anonymous call is the only source. The decision of the United States Court of Appeals for the Seventh Circuit completely ignores the requirement that the hearsay must be "from a source which in the past has proven reliable." *Jones* v. *United States,* 362 U.S. 257; *Aguilar* v. *State of Texas,* 378 U.S. 108.

Actually, it can be readily seen that the presence of "merchandise" in the described premises is based on nothing but an "anonymous call". We submit that this decision so far departs from the recognition by this Court that any proceeding by search warrant is drastic and must be clinically approached, that this Court should issue its Writ to the United States Court of Appeals for the Seventh Circuit in this cause.

## III.

In a concurring opinion, two of the three judges of the panel joining, the following is stated:

> "CUMMINGS, Circuit Judge, with whom FAIRCHILD, *Circuit Judge,* joins, concurring. The affidavit upon which the search warrant issued was concededly pre-

pared by the United States commissioner although signed by an FBI agent. Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:

> 'A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.'

"This Rule of course contemplates that the supporting affidavit be prepared by the affiant and not by the commissioner. The commissioner is not meant to play the dual roles of magistrate and investigator. Cf. *In re Murchison*, 349 U.S. 133, 137. No prejudice to defendant has been shown, so that reversal is unwarranted. Nevertheless, the practice of having the commissioner prepare any such affidavits should be disapproved in order that it will not recur in any Districts of this Circuit."

The rights here affected are of constitutional proportions. It is a right protected by no less than the Fourth Amendment which Rule 41(c) implements. The Supreme Court has had occasion to speak about "detached magistrates".

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magis-

> trate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *U. S.*, 333 U.S. 10, 13-14. See also *Schmerber* v. *United States,* 384 U.S. 757, 770.

Wherefore we submit this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

## IV.

The Court will note that in that portion of the concurring opinion quoted hereinabove, it is emphasized that no prejudice to the defendant was shown in order to warrant reversal. Thus is presented a novel and consequential question which has never been, but should be, settled by this Court. It is submitted to this Court that it should be sufficient that there has been a violation of the Federal Rules of Criminal Procedure, which implement the Fourth Amendment to the Constitution of the United States to insure that a neutral and detached magistrate stand as a bulwark to insure privacy. These petitioners submit to the Court that further answer to the Seventh Circuit's finding of no prejudice is that both of them have been convicted and one faces eighteen months incarceration as a result of this invasion. It should also be noted that this Court's decision in the *Murchison* case relied upon by the United States Court of Appeals for the Seventh Circuit was reversed.

## V.

The decision of the United States Court of Appeals for the Seventh Circuit in this case, hereinafter referred to as *Pascente,* is contrary to this Court's decision in *United States* v. *Milton James Roth,* No. 16173 dated November

20, 1967, (decision not reported but attached hereto as part of the Appendix), hereinafter referred to as *Roth*.

In the *Pascente* case the decision was by Judge Knoch, Judge Fairchild and Judge Cummings. The decision in *Roth* was by Chief Judge Hastings, Judge Kiley and Judge Swygert. The panel in the *Pascente* case held that the word "merchandise" was not unduly vague.

This Court in the *Roth* case held as follows (page 4 of the slip opinion):

> "When Morrison's testimony is compared with his statement in the affidavit, a contradiction is disclosed, glaring enough to require the trial court to find the affidavit insufficient as a matter of law.[3]"

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"[3] If Morrison's testimony is the correct version of the information given by the informant, the term 'products' could refer to any of the full range of items manufactured by Hamilton Beach rather than specifically to the stolen blenders. See p. 7 infra."

Turning then to page 7 of the *Roth* opinion:

> "Both of these omissions are highly critical in view of the nature of the premises, a 'garage-type warehouse,' and the type of merchandise stolen, a product that is mass produced by a nationwide manufacturer of a variety of household electrical appliances. Without detailing the date of Noonan's observation and what he specifically saw, Morrison's statement might have described any of a large number of warehouses that had received a shipment of Hamilton Beach products prior to or contemporaneously with the theft of the blenders in question. The statement, therefore, is too imprecise to establish probable cause that what Noonan observed on the defendant's premises was the stolen blenders."

This Court has held by the *Roth* decision that the word "products" even though coupled with Hamilton Beach is

insufficient as a matter of law. In the *Pascente* case, however, there is absolutely no description whatsoever other than the word "merchandise."

In both cases a Petition for Rehearing was filed before the Seventh Circuit. The Government's Petition for Rehearing in *Roth* was denied. These petitioners also petitioned for Rehearing *en banc* because of the intramural conflict demonstrated hereinabove. That also was denied, but two of the judges of the United States Court of Appeals for the Seventh Circuit were of the opinion that it should have been allowed. The two judges who were of the opinion the Court should sit *en banc* were part of the earlier panel in the *Roth* case.

It is patent that there now subsists two decisions in this Circuit contradictory in nature. The Circuit is left without a controlling standard in the important area of search and seizure going directly into individual constitutional rights. In the circumstances, we request this Court to exercise its power of supervision over lower Courts of Appeal and particularly the Seventh Circuit, that the public may be rightfully informed of what constitutes its rights and immunities from police interference with privacy.

It is respectfully submitted that this Court should issue its Writ of Certiorari to the Seventh Circuit for that purpose.

## CONCLUSION

WHEREFORE, these Petitioners pray this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
*Attorney for Petitioners.*

## APPENDIX A.

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1967 — SEPTEMBER SESSION, 1967

No. 16126
UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
WILLIAM ROGER PASCENTE and
FRANK J. FURIO,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 26, 1967

Before KNOCH, *Senior Circuit Judge,* and FAIRCHILD and CUMMINGS, *Circuit Judges.*

KNOCH, *Senior Circuit Judge.* The defendants, William Roger Pascente and Frank J. Furio, were charged in Count I of a two-count indictment with possession of goods stolen from an interstate freight shipment in violation of Title 18, U.S.C. §659. Count II charged the defendant William Roger Pascente with theft of the same goods. Jury trial was waived. All facts were stipulated. The defendants were convicted. The Court placed William Roger Pascente on probation for five years on each count,

to run concurrently, and committed Frank J. Furio to serve 18 months on Count I.

The defendants charge error in denial of their motion to quash the search warrant issued here and to suppress the evidence secured through its execution. They contend that the affidavit submitted was insufficient in law to establish probable cause for issuance of the search warrant, stating insufficient facts, being based only on the belief of the affiant and unsupported hearsay, and failing to mention articles which were subsequently seized from one of the petitioners. No other error is charged.

The affidavit in question consists of a printed form filled in and completed in what is obviously a hasty, handwritten scrawl, replete with abbreviations (some of them rather unconventional) and composed in a highly cryptic style, as follows:

> "The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the No. District of Ill. there is now being concealed certain property, namely several cartons of merchandise which constituted interstate commerce and were stolen therefrom. And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> > This information was furnished affiant by Spec Ag Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr of Mason-Dixon Lines, Chicago, carrier of freight that he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., Feb. 11, 1965, 2 men unloading truck of said into said residence. Marianne Costello living downstairs her steps up and down stairs at 11:30 P.M. Said terminal

> stated he found 5 interstate shipments missing from one of their trucks after the time stated."

Careful study of this document, however, discloses certain facts. Some prior to execution of the warrant on Friday, February 12, 1965, shortly before 5:00 p.m., the Terminal Manager, Paul Picquet, of the Mason-Dixon Line, furnished information to Special Agent Anthony Genakos of the F.B.I., who in turn passed it on to the affiant, that he had found five "interstate shipments" missing from one of his trucks. The Terminal Manager had also reported receipt of an anonymous telephone call from an alleged neighbor of 1913 W. Ohio Street, Chicago, the address of the premises later searched, concering his observation at 11:30 p.m., (an unusual time for delivery of commercial merchandise to a residence) on February 11, 1965, of the activities of two men who were unloading a Mason-Dixon truck and carrying the contents into the house at that address. Special Agent Genakos had also told the affiant that one Marianne Costello, who lived on the first floor of the two-apartment building searched, reported hearing footsteps going up and down the stairs at 11:30 p.m. that night.

To be sure, this was hearsay, but it was hearsay from three different sources, two of which were identified, all of which were mutually corroborative in part and worthy of credit. *Jones* v. *U. S.*, 362 U. S. 257, 272 (1960). A reasonably prudent person would be justified in believing an offense was being committed. *Evans* v. *U. S.*, 6 Cir., 1957, 242 F. 2d 534, 536, cert. den. 353 U. S. 976.

The Commissioner was entitled to exercise his own common sense and to draw reasonable inferences from the wording of the affidavit in the light of his extensive

experience. *Irby* v. *U. S.*, D. C. Cir., 1963, 314 F. 2d 251, 253, cert. den. 374 U. S. 482; *U. S.* v. *Ventresca*, 380 U. S. 102, 109 (1965).

We see no abuse of discretion in the Commissioner's decision that there was probable cause for issuance of the warrant. Nor can we agree that the word "merchandise" in the light of the circumstances here was unduly vague.

The judgment of the District Court is affirmed.

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No. 16126

CUMMINGS, *Circuit Judge*, with whom FAIRCHILD, Circuit Judge, joins, concurring. The affidavit upon which the search warrant issued was concededly prepared by the United States commissioner although signed by an FBI agent. Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:

> "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

This Rule of course contemplates that the supporting affidavit be prepared by the affiant and not by the commissioner. The commissioner is not meant to play the dual roles of magistrate and investigator. Cf. *In re*

*Murchison*, 349 U.S. 133, 137. No prejudice to defendant has been shown, so that reversal is unwarranted. Nevertheless, the practice of having the commissioner prepare any such affidavits should be disapproved in order that it will not recur in any Districts of this Circuit.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

Tuesday, December 26, 1967

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WILLIAM ROGER PASCENTE and FRANK J. FURIO, *Defendants-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

No. 16126

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

## APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, January 24, 1968

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WILLIAM ROGER PASCENTE, et al., *Defendants-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

No. 16126

It Is Ordered that the petition for a rehearing of this cause be, and it is hereby, Denied.

## APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, January 24, 1968

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

No. 16126 v.

WILLIAM ROGER PASCENTE, et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and it is hereby, Denied. (Judges Kiley and Swygert voted to grant the petition for rehearing *en banc*).

## APPENDIX E.

In The

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 16173 SEPTEMBER TERM, 1967 SEPTEMBER SESSION, 1967

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
MILTON JAMES ROTH,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

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NOVEMBER 20, 1967

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Before HASTINGS, *Chief Judge,* KILEY, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Milton James Roth appeals from a judgment of conviction pursuant to a jury verdict of guilty. The indictment charged that he knowingly had in his possession goods stolen from a shipment in interstate commerce in violation of 18 U.S.C. § 659. The only question in this appeal concerns the propriety of the district court's pre-trial ruling denying Roth's motion to suppress evidence seized pursuant to the execution of a search warrant.

On October 27, 1965 approximately three thousand Hamilton Beach blenders were placed on a truck in Chicago destined for Philadelphia. During the evening of October 29, the loaded truck disappeared and was found

empty the next afternoon on the far south side of Chicago, several miles from Hammond, Indiana. William Morrison, a Special Agent of the Federal Bureau of Investigation, obtained a warrant from a judge of the Lake County, Indiana Superior Court on November 1. Pursuant to that warrant, agents searched a garage-type, warehouse building adjacent to and a part of Day-Lite Foods, Hammond, Indiana, occupied by the defendant, and found the stolen blenders.

An affidavit sworn to by Agent Morrison was the only matter presented to the state court judge who issued the search warrant. After reciting the preliminary facts detailing the occurrence of the theft and the location of the building occupied by the defendant, the affidavit set forth two grounds purporting to establish probable cause that the blenders were contained on the defendant's premises.[1] The first was a statement that the affiant

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[1] The pertinent text of Agent Morrison's affidavit follows:

1. That the affiant is employed as a Special Agent of the Federal Bureau of Investigation, a branch of the United States Department of Justice and that affiant has continuously held such position as a Special Agent for the past 11 years.

2. That the affiant has reason to believe, and does believe, that there is now being concealed certain property, to-wit: a large number, believed to be 3,000, Hamilton Beach Electric Blenders, which electric blenders were part of an interstate shipment from C. and A. Terminal Company, Chicago, Illinois, consigned to Hamilton Beach, c/o Terminal Warehouse, Philadelphia, Pennsylvania, under B. and P. Motor Express Pro No. 266419, and which were stolen on or about October 29, 1965, from B. and P. Motor Express Trailer No. 784, which was parked in the yards of B. and P. Motor Express, Inc., Chicago, Illinois, and that the said electric blenders are now being kept at the following-described premises: In the building located at 6406 Calumet Avenue, Hammond, Indiana, and known as Day Lite Foods, which building is an "L" shaped structure made

received information from a confidential informant on October 31, 1965 to the effect that "said electric blenders" were on the defendant's premises and that the informant had in the past furnished accurate information and was a reliable source. The second was a statement that the affiant had been informed of the observation of another F.B.I. agent who had personally seen "a large number of boxes bearing the name 'Hamilton Beach'" through a window in the warehouse.

After he was arrested and before trial, the defendant moved to suppress the evidence obtained pursuant to the

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up of the main store building and an attached garage-type warehouse which extends from the rear portion of the building at a right angle, and in a southerly direction, along a certain public alley, which alley runs in a northerly-southerly direction behind said address, and parallel to Calumet Avenue.

3. That the information upon which the affiant bases his belief that said Hamlton Beach Electric Blenders are on said premises mentioned above is as follows:

(a) That on October 31, 1965, your affiant received information from a confidential informant that the said electric blenders were contained in the building above-described. That said informant has in the past furnished the affiant with reliable and accurate information and that he knows the informant to be a reliable source.

(b) That your affiant has been informed by Thomas Noonan, a Special Agent of the Federal Bureau of Investigation, that Agent Noonan personally observed a large number of boxes bearing the name "Hamilton Beach" in the premises above-described, and that such boxes were observed through a window by Agent Noonan while he was standing in a public parking lot adjacent to the said building.

(c) That the said B. and P. Motor Express Trailer No. 784 was found empty and abandoned at 103rd Street and Dan Ryan Expressway, in Chicago, Illinois, in the late afternoon of October 30, 1965.

execution of the warrant. The motion was denied by the district court.

Initially, we must determine the effect to be given to matters brought out at a hearing on a motion to suppress in assessing the sufficiency of an affidavit for a search warrant. When a court reviews whether an issuing magistrate has properly granted a search or an arrest warrant, the Supreme Court has cautioned, "the issue of probable cause . . . [has] to be determined by the . . . [magistrate], and an adequate basis for such a finding . . . [has] to appear on the face of the complaint." *Giordenello* v. *United States,* 357 U.S. 480, 487 (1958).[2] If an affidavit is the only matter presented to the issuing magistrate, as in this case, the warrant must stand or fall solely on the contents of the affidavit. What is subsequently adduced at a hearing on a motion to suppress, therefore, cannot be used by the trial court to augment an otherwise defective affidavit. But if the hearing discloses matters which discredit or impeach the assertions in an affidavit, these must be considered by the trial court in determining whether probable cause in fact existed.

At the hearing on the motion to suppress in the instant case, testimony was illicited which exposed a fatal flaw in the affidavit. The affiant, Morrison, testified that the confidential informant told him, "there was a load of Hamilton Beach *products* that were stored in a grocery

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[2] *Giordenello* dealt with the sufficiency of an affidavit for the issuance of an arrest warrant. The Supreme Court stated, however, "The language of the Fourth Amendment, . . of course applies to arrest as well as search warrants." 357 U.S. at 485, 486. In a subsequent case, *Aguilar* v. *Texas,* 378 U.S. 108, 109 n.1. (1964), the Court cited *Giordenello* with respect to the sufficiency of an affidavit for the issuance of a search warrant.

store out on the 6500 block of Calumet Avenue in Hammond, Indiana." In contrast, Morrison's affidavit stated that the informant told him that "the *said electric blenders* [the stolen items]" were on the defendant's premises. (Emphasis added.) When Morrison's testimony is compared with his statement in the affidavit, a contradiction is disclosed, glaring enough to require the trial court to find the affidavit as a matter of law.[3]

Other defects permeate the affidavit in addition to the contradiction. The statement therein that a confidential informant told Agent Morrison that "said electric blenders were contained" in the defendant's premises is at best hearsay. In all probability, the statement reflects hearsay on hearsay, the informant having received the information from someone else rather than by means of his own observation. Agent Morrison's testimony at the hearing supports this conclusion.[4]

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[3] If Morrison's testimony is the correct version of the information given by the informant, the term "products" could refer to any of the full range of items manufactured by Hamilton Beach rather than specifically to the stolen blenders. See p. 7, *infra*.

[4] The relevant testimony of Agent Morrison is as follows:

Q. Did you ask him from where or how he had obtained this information?

A. No, sir.

Q. Did you ask him whether or not he had seen the items in the store that he mentioned to you?

A. To the best of my knowledge, I don't recall asking him that.

Q. So you have no knowledge from him or from anyone else that he personally observed these items in the store, do you?

A. No, sir.

Q. You don't know whether he obtained that information from somebody else who may have observed it, do you?

A. No, sir, I don't.

Q. Has this informant in the past supplied you with information?

The Supreme Court has held that an affidavit "is not to be deemed insufficient" on the ground that it contains hearsay statements "so long as a substantial basis for crediting the hearsay is presented." *Jones* v. *United States,* 362 U.S. 257, 269 (1960). There the affidavit was held to be sufficient in part because the hearsay statements related the personal observations of the informant. Subsequent Supreme Court cases have elaborated upon the nature and extent of the corroboration necessary to sustain a search warrant issued pursuant to an affidavit containing hearsay. In *Aguilar* v. *Texas,* 378 U.S. 108, 109 (1964), the affiants, two local police officers, stated that they had received "reliable information from a credible person and do believe" the defendant possessed narcotics. Neither the police officers nor the informant had personally observed the facts recited in the affidavit. The Supreme Court held the affidavit insufficient to establish probable cause, stating:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal

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A. Yes, sir, he has.

Q. On how many occasions?

A. On several occasions.

Q. How many is several? Is it more than three?

A. Yes, sir.

Q. Now, this informant—and again I am not asking you to reveal the identity of the informant—obtains information from other so-called underworld sources and then transmits it to you, doesn't he? Isn't this the work he works most of the time?

A. Well, I would say in some cases, yes, and in some cases—we are talking about the past information, is that correct, sir?

Q. Yes.

A. I would say in some cases he did hear this from other individuals and a couple of cases he had personal knowledge of the information.

> observation of the affiant, . . . the magistrate must be informed of some of the *underlying circumstances* from which the informant concluded that the narcotics were where he claimed they were, and some of the *underlying circumstances* from which the officer concluded that the informant, . . . was "credible" or his information "reliable." 378 U.S. at 114. (Emphases added.)

In accordance with the teachings of *Jones* and *Aguilar*, if Morrison's affidavit contained only the statement of what the informant related to him without the support of any "underlying circumstances," there would be no adequate basis from which the magistrate could properly have concluded that probable cause existed. Despite the additional averment in the affidavit that the informant had "in the past furnished the affiant with reliable and accurate information and that he knows the informant to be a reliable source," that statement in itself is too barren either to credit or to corroborate the hearsay statements of the informant. Irrespective of the informant's reliability, he in turn may have received his information from someone wholly unreliable. Consequently, the fact that the agent vouched for the credibility or reliability of the informant cannot reach the crucial question posed by the hearsay on hearsay situation present in this case. For the reliability of both the anonymous hearsay source and the information he imparted to the informant is totally lacking.

We believe that an affidavit containing "inherently defective hearsay on hearsay" (that is, hearsay on hearsay as to which there is absent any indication of the reliability of the anonymous hearsay source) can withstand attack only if the "supporting circumstances" related therein are suf-

ficient in themselves to establish probable cause.[5] Morrison's statement in the affidavit that he was informed by Agent Noonan of his own observation of "boxes bearing the name 'Hamilton Beach' " on the defendant's premises fails to satisfy this requirement.

The Supreme Court recently considered the sufficiency of an affidavit reciting the observations of the affiant's fellow officers in *Ventresca* v. *United States,* 380 U.S. 102 (1965). That decision upheld the validity of a search warrant issued on the presentation of an affidavit in which the affiant based his belief that an illegal distillery was in operation on his own observations and "upon information received officially from other Investigators . . . assigned to this investigation, and reports orally made to me describing the results of their observations and investigations, . . ." 380 U.S. at 103, 104. Seven instances of the agents' observations of suspicious, incriminating activities were described.

A significant difference is apparent between the affidavit in *Ventresca* which relied on the observations of fellow officers (and which contained "not merely 'some of the underlying circumstances' . . . but a good many of them" 380 U.S. at 109) and Morrison's affidavit which relied on the observations of Noonan. The latter lacked the specificity found adequate in *Ventresca.* Neither the date on which Noonan observed the defendant's premises nor the

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[5] Thus if an affidavit, unlike Morrison's, indicated the highly reliable nature not only of the confidential informant but also of his anonymous hearsay source, a different problem would be posed. In such a situation, the quantum of "underlying circumstances" necessary to sustain the affidavit would decrease as the indicia of reliability of the anonymous hearsay source increased.

type of Hamilton Beach products he observed were recited in the affidavit. Both of these omissions are highly critical in view of the nature of the premises, a "garage-type warehouse," and the type of merchandise stolen, a product that is mass produced by a nationwide manufacturer of a variety of household electrical appliances. Without detailing the date of Noonan's observation and what he specifically saw, Morrison's statement might have described any of a large number of warehouses that had received a shipment of Hamilton Beach products prior to or contemporaneously with the theft of the blenders in question.[6] The statement, therefore, is too imprecise to establish probable cause that what Noonan observed on the defendant's premises was the stolen blenders.

Although we are mindful of the Supreme Court's admonition in *Ventresca* that "affidavits for search warrants, . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion," we may not overlook the equally important charge that sufficient specificity of an affidavit for a search warrant "is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." 380 U.S. at 108, 109. We feel constrained, in light of the reasons heretofore outlined, to hold that the district court erred in refusing to grant the defendant's motion to suppress the evidence obtained as a result of the search.

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[6]Although we previously held that an affidavit setting forth the observations of fellow F.B.I. agents was sufficient to sustain the issuance of a search warrant, *United States* v. *McCormick*, 309 F.2d 367 (7th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963), the affidavit there, like the one in *Ventresca*, was more specific than Morrison's affidavit in this case.

The judgment of the district court is reversed and the case is remanded for a new trial.

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HASTINGS, *Chief Judge,* concurring.

I concur in the result reached in this case.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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No. 1145

Supreme Court, U.S.
FILED
MAR 18 1968
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

## OCTOBER TERM, 1967

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WILLIAM ROGER PASCENTE and
FRANK J. FURIO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General,*

FRED M. VINSON, JR.,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
J. THOMAS CARROLL, JR.,
*Attorneys,*
*Department of Justice,*
*Washington, D. C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1967

---

No. 1145

WILLIAM ROGER PASCENTE and
FRANK J. FURIO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A. 1-5) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. A timely petition for rehearing was denied on January 24, 1968. The petition for a writ of certiorari was filed on February 23,

1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the affidavit in support of a search warrant was sufficient to show probable cause.
2. Whether the search warrant described the articles to be seized with sufficient specificity.
3. Whether the search warrant was defective because the commissioner wrote down the information related to him by the affiant, who thereafter signed the affidavit in the commissioner's presence.

## STATEMENT

Both petitioners were convicted in the United States District Court for the Northern District of Illinois of possession of goods stolen from interstate commerce in violation of 18 U.S.C. 659. Petitioner Pascente was also convicted of the theft of the goods (R. 4-7). Petitioner Pascente was sentenced to five years' probation on each count, the terms to run concurrently and petitioner Furio received a sentence of eighteen months' imprisonment (R. 61-62). The court of appeals affirmed (Pet. App. A. 1-5).

The evidence, the sufficiency of which is not in question here, established that in the early evening of February 11, 1965, a Mason-Dixon Lines truck containing seven cartons was parked in the company lot (R. 32, 33). Petitioner Pascente, a Mason-Dixon employee who was working that evening, had been observed in the terminal area at about the time a "straight job" truck (similar to truck No. 3792 from

which the cartons in question were taken) was observed leaving the terminal (R. 35, 36). One fellow employee related that petitioner Pascente had told him that he was going to use a company truck for some personal business (R. 38). Another stated that soon after Pascente left his presence, he observed that the "straight job" was gone. He did not see Pascente until he noticed the truck on the lot again (R. 36). The following morning, the terminal manager discovered that five interstate shipments had been taken from truck No. 3792 (R. 29, 30-31). It was stipulated that the goods stolen constituted a shipment in interstate commerce and were valued at $735 (R. 27-28).

After obtaining a search warrant, the FBI agents went to petitioner Furio's residence. After receiving no response to their knocking, they forcibly entered the apartment where they discovered eleven cartons of merchandise. While the agents were drawing up an inventory (R. 16-20), petitioners Pascente and Furio entered and were placed under arrest (R. 40-43).

The issues raised relate primarily to the affidavit in support of the search warrant. It reads in pertinent part:

> The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the No. District of Illinois there is now being concealed certain property, namely several cartons of merchandise which constituted interstate

commerce and were stolen therefrom. And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

> This information was furnished affiant by Spec Ag Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr of Mason-Dixon Lines, Chicago, carrier of freight that he received an anonymous call [*sic*] who stated he was a neighbor, that he observed at 11:30 p.m., Feb. 11, 1965, 2 men unloading truck of said into said residence. Marianne Costello living downstairs her [*sic*] steps up and down stairs at 11:30 p.m. Said terminal [*sic*] stated he found 5 interstate shipments missing from one of their trucks after the time stated. [R. 14.]

The commissioner himself actually transcribed the words as they were related to him by an F.B.I. agent, who then signed the affidavit in the commissioner's presence.

## ARGUMENT

1. While the affidavit was concededly written in a hurried and cryptic style (Pet. App. A. 2), it must be read in a non-technical, common-sense fashion so as to grant to the phraseology the full import intended by its authors, *United States* v. *Ventresca*, 380 U.S. 102, 108-109. Thus read, the following salient facts become evident: The Mason-Dixon Lines' terminal manager discovered several interstate shipments missing from a company truck. He also received information by telephone from an unknown caller that at approximately 11:30 on the night of

February 11, 1965, two men were observed transporting the contents of a Mason-Dixon truck into the residence at 1913 West Ohio Street, Chicago, Illinois. After some investigation by the F.B.I., the resident of the downstairs apartment at that address related that she heard persons going up and down the steps at 11:30 p.m.[1] These facts afforded the magistrate a substantial basis for determining that there was probable cause to believe that cartons stolen from the truck were concealed in the second floor apartment. See *Aguilar* v. *Texas*, 378 U.S. 108, 114-115; *Rugendorf* v. *United States*, 376 U.S. 528, 533. That the affiant relied on hearsay is of no consequence, as long as there is a substantial basis for crediting the hearsay. *Jones* v. *United States*, 362 U.S. 257, 272; *United States* v. *Ventresca*, 380 U.S. 102, 108.

Information from an unknown informant may provide probable cause where that information is corroborated by other evidence. Here, the unknown caller's statement that merchandise from a Mason-Dixon truck had been taken into 1913 West Ohio Street at 11:30 p.m. on the night of February 11, 1965, was corroborated by the information from the terminal manager that merchandise was missing from such a truck and by the statement of a resident at the stated address that people were heard going up and down the stairs at the very hour the caller said the merchandise was taken into the house. In these circumstances the information set forth on the face of the

[1] While no date is mentioned in the affidavit one would have to stretch his imagination to assume that the witness had reference to a night other than February 11, 1965.

affidavit clearly provided the magistrate with probable cause to believe that stolen goods were being stored in the apartment. See *Giordenello* v. *United States*, 357 U.S. 480, 487.

2. The search warrant authorized the agents to seize "several cartons of merchandise which constituted interstate commerce and were stolen therefrom" (R. 15). Petitioners argue that the magistrate's utilization of the word "merchandise" is too imprecise to satisfy the Fourth Amendment. However the Fourth Amendment's requirement of particularity is satisfied if the officers can reasonably ascertain and identify the articles from the face of the warrant. See *Steele* v. *United States No. 1*, 267 U.S. 498, 504. There is no requirement that the articles sought be described with exactitude. See *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 554. The precision of the description is to be measured in terms of the nature of the goods to be seized and their relationship to the alleged offense. *Katz* v. *United States*, 369 F. 2d 130, 134-135 (C.A. 9), reversed on other grounds, 389 U.S. 347, and cases cited therein.[2] Here, the agents who applied for the warrant knew that the articles sought were of a commercial nature and that the place to be searched was of a residential nature. It

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[2] *Stanford* v. *Texas*, 379 U.S. 476, and the cases cited therein, are inapposite. The warrants in those cases were directed against objects protected by both the First and Fourth Amendments where the particularity test has historically been applied with "scrupulous exactitude". *Id.* at 485. The Court specifically left open the question whether, absent First Amendment considerations, the same warrant would have satisfied constitutional requirements.

would have been highly improbable that the apartment would contain so many cartons of a commercial type that the officers would not be able to identify readily the articles which they sought.[3] Indeed, the record reveals that the agents identified the cartons without any difficulty upon entering the apartment (R. 40-43).

3. At the time the search warrant was issued, the agent orally stated the relevant facts to the commissioner, who prepared the affidavit which the agent then signed. Petitioner asserts that in writing out the affidavit, the commissioner assumed an inquisitorial role. There is no indication, however, that the commissioner did anything more than reduce the agent's statements to writing—a function which was clerical rather than investigatory.

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[3] Petitioners' attempt to suggest a conflict within the Seventh Circuit is unpersuasive. The warrant was held invalid in *Roth* v. *United States* (Pet. App. E) because the affidavit contained erroneous information. Furthermore, the warrant was found to be lacking in specificity because the articles—commercial in nature—were not sufficiently differentiated from other articles of similar nature which might have also been stored in the warehouse which was to be searched.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
J. THOMAS CARROLL, JR.,
*Attorneys.*

MARCH 1968.

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